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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 WILLIE R. HARRIS,) Case No. CV 06-5031-JTL
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13 Plaintiff,)
14) MEMORANDUM OPINION AND ORDER
15 v.)
16)
17 MICHAEL J. ASTRUE,)
18 Commissioner of Social)
19 Security,)
20)
21 Defendant.)
22 _____)
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18 PROCEEDINGS

19 On August 11, 2006, Willie R. Harris ("plaintiff") filed a
20 Complaint seeking review of the Commissioner's denial of her
21 application for Social Security Disability and Supplemental Security
22 Income benefits. On October 3, 2006, plaintiff filed a Consent to
23 Proceed Before United States Magistrate Judge Jennifer T. Lum. On
24 October 10, 2006, Michael J. Astrue ("defendant") filed a Consent to
25 Proceed Before United States Magistrate Judge Jennifer T. Lum.
26 Thereafter, on March 1, 2007, defendant filed an Answer to Complaint.
27 On May 25, 2007, the parties filed their Joint Stipulation.
28

The matter is now ready for decision.

BACKGROUND

On May 6, 2004, plaintiff filed an application for supplemental social security benefits. (Administrative Record ["AR"] at 305-07). Plaintiff alleged that beginning on September 30, 2003, she was unable to work because she suffered from immobility caused by intense pain and swelling in her neck, head, shoulders, upper back, arms, thumbs, and hands that was a result of carpal tunnel syndrome, tendonitis, and a bi-lateral cervueal [sic] sprain. (AR at 103). The Commissioner denied plaintiff's application for benefits. (AR at 30-35).

On or about August 31, 2004, plaintiff requested a hearing before an Administrative Law Judge ("ALJ"). (AR at 41). On December 7, 2005, the ALJ conducted a hearing in Downey, California. (See AR at 320-339). Plaintiff appeared at the hearing with counsel and testified. (Id.). Joseph Torres, a vocational expert, also testified at the hearing. (See AR at 332-338).

On January 25, 2006, the ALJ issued his decision denying benefits to plaintiff. (AR at 19-28). The Appeals Council denied plaintiff's timely request for review of the ALJ's decision. (AR at 6-8).

Thereafter, plaintiff appealed to the United States District Court.

PLAINTIFF'S CONTENTIONS

Plaintiff makes the following claims:

1. The ALJ failed to properly resolve the conflicts between the vocational expert's testimony and the information contained in the Department of Labor's Dictionary of Occupational Titles ("DOT").

2. The ALJ erred in failing to apply the Medical Vocational Rules (the "grids").

1 423(d)(1)(A). The Commissioner has established a five-step sequential
2 process to determine whether a claimant is disabled. 20 C.F.R. §§
3 404.1520, 416.920.

4 The first step is to determine whether the claimant is presently
5 engaging in substantially gainful activity. Parra v. Astrue, 481 F.3d
6 742, 746 (9th Cir. 2007). If the defendant is engaging in
7 substantially gainful activity, disability benefits will be denied.
8 Bowen v. Yuckert, 482 U.S. 137, 141 (1987). Second, the ALJ must
9 determine whether the claimant has a severe impairment. Parra, 481
10 F.3d at 746. Third, the ALJ must determine whether the impairment is
11 listed, or equivalent to an impairment listed, in Appendix I of the
12 regulations. Id. If the impediment meets or equals one of the listed
13 impairments, the claimant is presumptively disabled. Bowen, 482 U.S.
14 at 141. Fourth, the ALJ must determine whether the impairment
15 prevents the claimant from doing past relevant work. Parra, 481 F.3d
16 at 746. If the claimant cannot perform her past relevant work, the
17 ALJ proceeds to the fifth step and must determine whether the
18 impairment prevents the claimant from performing any other
19 substantially gainful activity. Parra, 481 F.3d at 746.

20 The claimant bears the burden of proving steps one through four,
21 consistent with the general rule that at all times, the burden is on
22 the claimant to establish her entitlement to disability insurance
23 benefits. Id. Once this prima facie case is established by the
24 claimant, the burden shifts to the Commissioner to show that the
25 claimant may perform other gainful activity. Lounsbury v. Barnhart,
26 468 F.3d 1111, 1114 (9th Cir. 2006).

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1 **B. The Vocational Expert's Testimony**

2 In her first claim, plaintiff alleges that the ALJ failed to
 3 properly resolve the conflicts between the vocational expert's
 4 testimony and the information contained in the Department of Labor's
 5 Dictionary of Occupational Titles ("DOT"). Plaintiff argues the
 6 alleged differences triggered the ALJ's duty to develop the record and
 7 the ALJ failed to meet this duty. Defendant concedes that the
 8 vocational expert mixed up the job requirements, but argues the mix-
 9 ups are irrelevant because the vocational expert testified that
 10 plaintiff's skills were readily transferable to both of the
 11 occupations discussed. Defendant argues that the vocational expert's
 12 error regarding the DOT numbers cannot be reasonably characterized as
 13 a conflict with the DOT that the ALJ was duty bound to explore.

14 An ALJ may not rely on a vocational expert's testimony regarding
 15 the requirements of a particular job without first inquiring whether
 16 the testimony conflicts with the DOT. Massachi v. Astrue, 486 F.3d
 17 1149; 2007 U.S. App. LEXIS 11115, *7 (9th Cir. May 11, 2007). Social
 18 Security Regulation 00-4p¹ provides:

19 When a VE [vocational expert] or VS [vocational
 20 specialist] provides evidence about the
 21 requirements of a job or occupation, the
 22 adjudicator has an affirmative responsibility to
 23 ask about any possible conflict between that VE

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 25 ¹ Social Security Rulings are issued by the Commissioner to
 26 clarify the Commissioner's regulations and policies. Bunnell v.
 27 Sullivan, 947 F.2d 341, 346 n.3 (9th Cir. 1991)(en banc).
 28 Although they do not have the force of law, they are,
 nevertheless given deference "unless they are plainly erroneous
 or inconsistent with the Act or regulations." Chavez v. Dep't of
Health & Human Servs., 103 F.3d 849, 851 (9th Cir. 1996).

1 or VS evidence and information provided in the
2 DOT. In these situations, the adjudicator will:
3 [ask the VE or VS if the evidence he or she has
4 provided conflicts with information provided in
5 the DOT; and [if the VE's or VS's evidence
6 appears to conflict with the DOT, the adjudicator
7 will obtain a reasonable explanation for the
8 apparent conflict.

9 If the ALJ does not ask the vocational expert whether his
10 testimony conflicts with the DOT, the reviewing court cannot determine
11 whether substantial evidence supports the ALJ's findings. Massachi,
12 486 F.3d 1149; 2007 U.S. App. LEXIS 11115 at *11-12 (citing Prochaska
13 v. Barnhart, 454 F.3d 731, 736 (7th Cir. 2006)); see also Travis v.
14 Astrue, 477 F.3d 1037, 1042 (8th Cir. 2007) ("This court will not
15 substitute its opinion for the ALJ's, who is in a better position to
16 gauge credibility and resolve conflicts in evidence.").

17 Here, the ALJ did not ask the vocational expert whether his
18 testimony conflicted with the DOT, and, if so, whether there was a
19 reasonable explanation for the conflict. (See AR at 320-329). As a
20 result, the Court cannot determine whether substantial evidence
21 supports the ALJ's conclusion that plaintiff had transferable skills
22 or the ALJ's step-five conclusion that plaintiff could perform other
23 substantially gainful activity.

24 In fact, there were inconsistencies between the vocational
25 expert's testimony and the DOT. The vocational expert testified that
26 an information clerk, DOT code 237.367-018, was a level three specific
27 vocational preparation ("SVP") occupation, which indicates it would
28 take a typical worker over one month and up to and including three

1 months to learn the techniques, acquire the information, and develop
2 the facility needed for average performance in a specific job-worker
3 situation. However, according to the DOT, the SVP for an information
4 clerk is a level two, which includes anything beyond a short
5 demonstration up to and including a one month period.

6 Similarly, the vocational expert testified that the clerical
7 information clerk position, DOT code 237.367-022, is an SVP three
8 occupation, an unskilled job that takes about one month to learn, (AR
9 at 338), while the DOT states the position has an SVP of four, which
10 indicates it would take the typical worker over three months and up to
11 and including six months to learn the techniques, acquire the
12 information, and develop the facility needed for average performance.

13 Given that the ALJ failed to inquire whether the vocational
14 expert's testimony conflicted with the DOT, the ALJ erred in relying
15 on the vocational expert's testimony. Because an actual conflict does
16 exist, the Court can affirm the ALJ's decision only if the record
17 contains persuasive evidence to support the deviation. Pinto v.
18 Massanari, 249 F.3d 840, 845 (9th Cir. 2001). Moreover, the Ninth
19 Circuit requires either specific findings of fact regarding a
20 plaintiff's residual functionality or inferences drawn from the
21 context of the vocational expert's testimony in support of a deviation
22 from the DOT. Light v. Comm'r of the Social Security Admin., 119 F.3d
23 789, 793 (9th Cir. 1997).

24 Here, the ALJ relied heavily on the vocational expert's testimony
25 (see AR at 26-28), but did not provide reasons for adopting the
26 vocational expert's deviation from the DOT. The Court cannot identify
27 any persuasive evidence in the record to justify this deviation.
28 Accordingly, the ALJ erred in failing to ask the vocational expert if

1 his testimony conflicted with the DOT and in relying on the vocational
2 expert's testimony without making specific findings to explain the
3 deviation from the DOT.

4 **C. The ALJ's Use of Grids**

5 In her second claim, plaintiff argues that the vocational
6 expert's testimony was insufficient to support a denial of benefits
7 and the ALJ should have used the Commissioner's medical-vocational
8 guidelines ("grids") to find plaintiff disabled under 20 C.F.R. Part
9 404, Subpart P, Appendix 2, § 201.06.

10 An ALJ may apply the grids to determine a claimant's residual
11 functional capacity. See Widmark v. Barnhart, 454 F.3d 1063, 1069
12 (9th Cir. 2006). However, an ALJ should rely on grids only when they
13 accurately and completely describe the claimant's abilities and
14 limitations. Id.

15 Generally, an ALJ should obtain a vocational expert's opinion
16 where the plaintiff suffers from only severe non-exertional
17 impairments or suffers from a combination of severe exertional and
18 non-exertional impairments. Lounsbury, 468 F.3d at 1115. Non-
19 exertional (not strength related) limitations include mental, sensory,
20 postural, manipulative, and environmental limitations. 20 C.F.R. Part
21 404, Subpart P, Appendix 2, § 200.00(3); Derosiers v. Sec'y of Health
22 & Human Servs., 846 F.2d 573, 579 (9th Cir. 1988). In contrast, where
23 a claimant suffers primarily from an exertional impairment limiting
24 the plaintiff's strength to sit, stand, walk, carry, lift, push, or
25 pull, the use of the grids without a vocational expert's testimony may
26 be proper. See Cooper v. Sullivan, 880 F.2d 1152, 1156 (9th Cir.
27 1989).

1 In his decision, the ALJ noted plaintiff was 58 years old at the
2 time of the decision and, as such, an individual closely approaching
3 advanced age, has more than a high school education, and a skilled
4 work background. (AR at 26). The ALJ adopted the testimony of the
5 vocational expert that plaintiff had skills that were easily
6 transferable. (*Id.*). Relying on this testimony, the ALJ found
7 plaintiff could perform the demands of the full range of sedentary
8 work and found plaintiff to be "not disabled" under Medical Vocational
9 Rule 201.07.

10 Because plaintiff suffered from only severe exertional
11 limitations, the ALJ's use of the grids was proper. (*See* AR at 21).
12 The ALJ relied on the vocational expert's testimony and concluded that
13 because plaintiff did have transferable skills he was "not disabled"
14 under Medical Vocational Rule 201.07. However, as discussed above,
15 the ALJ erred in failing to ask the vocational expert if his testimony
16 conflicted with the DOT, and there are no findings to explain his
17 deviation from the DOT. Accordingly, the ALJ erred in relying on the
18 vocational expert's determination that plaintiff had transferable
19 skills in applying Medical Vocational Rule 201.07 instead of Rule
20 201.06, which supports a finding of "disabled."

21 **D. The ALJ's Hypothetical to the Vocational Expert**

22 Plaintiff claims that the ALJ erred by providing the vocational
23 expert with an inaccurate hypothetical regarding plaintiff's
24 limitations. Defendant argues, however, that the ALJ did not err in
25 propounding a hypothetical to the vocational expert that differed from
26 the final RFC because the ALJ's hypothetical stated plaintiff had the
27 capacity to perform a full range of sedentary work, which was more
28 restrictive than the ALJ's RFC findings. (AR at 27).

1 In order for a vocational expert's testimony to constitute
2 substantial evidence, the hypothetical question posed must consider
3 all of the claimant's limitations. Andrews v. Shalala, 53 F.3d 1035,
4 1044 (9th Cir. 1995). While the ALJ need not include every alleged
5 impairment in his hypothetical, he must make specific findings
6 explaining his rationale for disbelieving any subjective complaints
7 that are not included. Copeland v. Bowen, 861 F.2d 536, 540 (9th Cir.
8 1988).

9 As discussed above, the credibility of the vocational expert was
10 at issue. Therefore, the ALJ erred in relying on the vocational
11 expert's testimony regarding the plaintiff's RFC.

12 **E. ALJ's Consideration of the Treating Physician's Opinion**

13 Plaintiff argues that the ALJ erred in rejecting the opinion of
14 Philip Sobol, M.D., plaintiff's treating physician, and in failing to
15 meet his duty to develop the record. Defendant argues that the ALJ
16 properly rejected Dr. Sobol's opinion because his assessment of
17 plaintiff's condition was inconsistent with the bulk of the medical
18 evidence and the opinions of Elizabeth Sander, M.D., Allen I. Salick,
19 M.D., and Gregg H. Small, M.D.

20 More weight is given to the opinion of a treating physician than
21 that of a nontreating physician because a treating physician is
22 employed to cure and has a greater opportunity to know and observe the
23 patient as an individual. Andrews, 53 F.3d at 1040-41. The ALJ may
24 reject an uncontroverted opinion of a treating physician only for
25 clear and convincing reasons. Id. at 1041. Where the opinion of the
26 treating physician is contradicted by another doctor, the opinion of
27 the treating physician may not be rejected without providing "specific
28 and legitimate reasons" supported by substantial evidence in the

1 record for doing so. Lester v. Chater, 81 F.3d 821, 830 (9th Cir.
2 1996).

3 In a social security case, the ALJ has an independent duty to
4 fully and fairly develop the record and assure that the plaintiff's
5 interests are considered. Tonapetyan v. Halter, 242 F.3d 1144, 1151
6 (9th Cir. 1991). The ALJ's duty to develop the record exists even
7 when the claimant is represented by counsel. See Brown v. Heckler,
8 713 F.2d 441, 443 (9th Cir. 1983).

9 When the evidence is ambiguous, or if the ALJ finds that the
10 record is inadequate to allow for proper evaluation, the ALJ has a
11 duty to "conduct an appropriate inquiry." Smolen v. Chater, 80 F.3d
12 1273, 1288 (9th Cir. 1996). Although the ALJ has a duty to develop
13 the record, the burden of proving disability remains on the claimant.
14 Bayliss v. Barnhart, 427 F.3d 1211, 1217 (9th Cir. 2005).

15 Here, the ALJ found plaintiff had mild spondylosis at C5-6 and
16 C6-7, small rotary cuff tears in her shoulders, and sciaticia. (See
17 AR at 21, 231, 237, 256, 274). The ALJ found plaintiff's allegations
18 of disabling carpal tunnel syndrome and high blood pressure to be
19 without merit. (AR at 21). While Dr. Sobol did diagnose plaintiff
20 with carpal tunnel syndrome in April 2001, the ALJ's decision to
21 discredit his opinion of plaintiff's carpal tunnel was clearly laid
22 out in his decision and supported by substantial evidence in the
23 record. The ALJ noted that on January 6, 2004, plaintiff told Dr.
24 Small her right hand paresthesias had markedly improved and occurred
25 on an infrequent basis. (AR at 21, 167). In his decision, the ALJ
26 cites Dr. Small's examination of plaintiff and his results which
27 indicated no evidence of left carpal tunnel syndrome and results at
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1 the upper limits of normal on plaintiff's right side. (AR at 21,
2 168). The ALJ also cited claimant's acknowledgment that she could
3 lift a toothbrush and personal care items, carry keys and a purse
4 every day, and drive a car every day. (AR at 21).

5 Furthermore, the record contains reports by Dr. Salick (AR 140-
6 41) and Dr. Sander (AR 298) that provide substantial medical support
7 for the ALJ's decision to reject Dr. Sobol's opinion.

8 The ALJ's decision to reject Dr. Sobol's opinion regarding the
9 severity of plaintiff's carpal tunnel syndrome was within his
10 discretion and supported by the specific and legitimate evidence
11 contained in Dr. Small's reports, which were cited in the decision,
12 and by substantial evidence in the record in the form of Dr. Salick's
13 and Dr. Sander's reports. Accordingly, the ALJ did not err in
14 rejecting Dr. Sobol's opinion regarding plaintiff's carpal tunnel
15 syndrome.

16 **F. Rejection of Plaintiff's Pain Testimony**

17 Plaintiff objects to the ALJ's determination that plaintiff
18 lacked credibility regarding her alleged functional limitations.
19 Defendant argues that the ALJ's credibility finding is supported by
20 substantial evidence and is entitled to deference.

21 Pain of sufficient severity caused by a medically diagnosed
22 "anatomical, physiological, or psychological abnormality" may serve as
23 the basis for a finding of disability. 42 U.S.C. § 423(d)(5)(A); see
24 Light, 119 F.3d at 792.

25 However, an ALJ need not believe every allegation of disabling
26 pain. See Orteza v. Shalala, 50 F.3d 748, 750 (9th Cir. 1995). Where
27 there is no evidence of malingering, an ALJ may reject a claimant's
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1 testimony regarding the severity of his or her symptoms only if the
2 ALJ sets forth legally permissible, specific, clear and convincing
3 reasons for doing so. Smolen v. Charter, 80 F.3d 1273, 1283-84 (9th
4 Cir. 1996). The ALJ must specifically identify what testimony is
5 credible and what evidence undermines the claimant's complaints.
6 Morgan v. Comm'r of the Social Security Admin., 169 F.3d 595, 599 (9th
7 Cir. 1999).

8 A finding that the claimant lacks credibility cannot be based
9 wholly on a lack of medical support for the severity of her pain.
10 Light, 119 F.3d at 792. A claimant need not produce evidence of pain
11 other than her own subjective testimony. Smolen, 80 F.3d at 1282.
12 Nor must a claimant present objective medical evidence of a causal
13 relationship between the impairment and the type of symptom. Id.;
14 Johnson v. Shalala, 60 F.3d 1428, 1433 (9th Cir. 1995). Rather, the
15 claimant need only produce objective medical evidence of an underlying
16 impairment which could reasonably be expected to produce the pain or
17 other symptoms alleged. Bunnell v. Sullivan, 947 F.2d 341, 344 (9th
18 Cir. 1991) (en banc). This approach reflects the Ninth Circuit's
19 recognition of the "highly subjective and idiosyncratic nature of pain
20 and other such symptoms," such that "[t]he amount of pain caused by a
21 given physical impairment can vary greatly from individual to
22 individual." Smolen, 80 F.3d at 1282.

23 "An individual's statements about the intensity and persistence
24 of pain or other symptoms or about the effect the symptoms have on his
25 or her ability to work may not be disregarded solely because they are
26 not substantiated by objective medical evidence." SSR 96-7p.
27 Instead, a claimant must demonstrate only two things: objective
28 medical evidence of an impairment or impairments; and (2) that the

1 impairment or combination of impairments could reasonably be expected
2 to produce some degree of symptom, not that it did, in fact. SSR 96-
3 7p; see also SSR 96-3p.

4 When evaluating a claimant's credibility, the ALJ should consider
5 the claimant's reputation for lying, prior inconsistent statements
6 concerning the symptoms, and other testimony by the claimant that
7 appears less than candid; unexplained or inadequately explained
8 failure to seek treatment or to follow a prescribed course of
9 treatment; and the claimant's daily activities. Smolen, 80 F.3d at
10 1284. Conflicts in a claimant's statements or testimony support a
11 finding that the claimant lacks credibility. Fair v. Bowen, 885 F.2d
12 597, 604 n.5 (9th Cir. 1989).

13 With respect to daily activities, the Ninth Circuit has held that
14 a specific finding that a claimant is able to spend a substantial part
15 of her day engaged in pursuits involving the performance of physical
16 functions that are transferable to a work setting may be sufficient to
17 discredit a claimant's allegations of pain. Vertigan v. Halter, 260
18 F.3d 1044, 1049 (9th Cir. 2001). However, the Ninth Circuit cautioned
19 that "many home activities are not easily transferable to what may be
20 the more grueling environment of the workplace, where it might be
21 impossible to periodically rest or take medication." Fair v. Bowen,
22 885 F.2d at 603.

23 The Ninth Circuit has found that activities, such as grocery
24 shopping, driving a car, or limited walking for exercise do not "in
25 any way detract from [a claimant's] credibility as to [his or her]
26 overall disability." Vertigan, 260 F.3d at 1050. The Ninth Circuit
27 has repeatedly stated that a claimant need not be utterly
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1 incapacitated in order to be disabled under the Social Security Act.
2 See Fair, 885 F.2d at 603; Vertigan, 260 F.3d at 1050.

3 An ALJ's reasons for discrediting a claimant's testimony must be
4 sufficiently specific for the reviewing court to assess whether the
5 decision was impermissibly arbitrary. Bunnell, 947 F.2d at 345-56.
6 As discussed below, taken as a whole, the ALJ's reasons for rejecting
7 plaintiff's credibility withstand scrutiny.

8 The first and second reasons given in support of the ALJ's
9 decision to reject plaintiff's credibility are the analyses of
10 plaintiff's non-severe impairments and the analyses of Dr. Sobol's
11 opinion that are included in the ALJ's decision, and incorporated by
12 reference. (AR at 24-25). While a finding that plaintiff lacks
13 credibility cannot be based wholly on the lack of medical support for
14 the severity of her pain, the ALJ's analyses of plaintiff's non-severe
15 impairments and of Dr. Sobol's opinion provide valid support for the
16 conclusion that plaintiff's pain testimony lacks credibility.

17 Defendant notes that the inconsistencies found in plaintiff's
18 complaints of debilitating carpal tunnel syndrome, high blood
19 pressure, inability to concentrate and the medical evidence that
20 caused the ALJ to label them "non-severe" indicate that plaintiff is
21 prone to exaggerate her symptoms, which is a valid basis to reject
22 plaintiff's credibility. See Smolen, 80 F.3d at 1284.

23 Similarly, the ALJ held that plaintiff's denial of arthralgias,
24 soft tissue swelling, and localized joint pain on both November 20,
25 2003 and April 29, 2005, was inconsistent with her claim that her pain
26 is constant. (AR at 25). Such statements indicate plaintiff is prone
27 to exaggerate symptoms, and is a valid basis to reject plaintiff's
28 credibility.

1 Next, the ALJ stated that plaintiff's alleged symptoms are out of
2 proportion with the objective physical findings. (AR at 25). In
3 addition, the ALJ held that plaintiff "has not provided convincing
4 details about factors which precipitate the allegedly disabling
5 symptoms, claiming that her pain is constant." Id. In order to avoid
6 having her statements regarding the intensity and persistence of pain
7 discredited where there is no objective evidence of pain, plaintiff
8 must demonstrate objective evidence of an impairment and that the
9 impairment could reasonably be expected to produce some degree of
10 symptoms. SSR 96-7p. The ALJ references the MRI studies of her
11 cervical spine and left shoulder and cites Dr. Sobol's statement
12 questioning the evidence of a tear in supraspinatous tendon of
13 plaintiff's left shoulder. (AR at 25). As discussed above, evidence
14 supporting plaintiff's habit of exaggeration and lack of candor
15 regarding her symptoms support a finding that plaintiff's pain
16 testimony is not credible.

17 The ALJ held that plaintiff made inconsistent statements
18 regarding matters relevant to her disability. The ALJ noted
19 inconsistencies in plaintiff's descriptions of her activities. (AR at
20 25). A claimant's daily activities are relevant to a disability
21 determination. Here, plaintiff's statement that she goes to church
22 and bible study twice a week is technically inconsistent with her
23 previous statement that she has no activities. However, limited
24 activities, such as these, do not detract from a claimant's
25 credibility as to her overall disability. See Vertigan, 260 F.3d at
26 1050. Accordingly, evidence of one such inconsistent statement is
27 harmless and does not negatively impact plaintiff's credibility. The
28 ALJ notes plaintiff asserted Dr. Sobol had recommended surgery, but

1 that Dr. Sobol's records do not reflect such a recommendation. (AR at
2 25). In order for the ALJ to use this as a basis to undermine
3 plaintiff's credibility, the ALJ must, at the very least, make an
4 attempt to obtain additional records from Dr. Sobol and verify that an
5 inconsistency does indeed exist. There is no evidence in the record
6 reflecting such an effort. In addition, the ALJ held that the fact
7 that claimant's chiropractor reported on November 1, 2004 that the
8 claimant had responded favorably to treatment indicate that her
9 allegations of ongoing pain are not credible. (AR at 25). Here, too,
10 the record is unclear regarding whether "responded favorably" is
11 inconsistent with an allegation of ongoing pain. The ALJ must, at the
12 very least, make an attempt to obtain additional records from the
13 chiropractor to ensure an inconsistency truly exists if it is to serve
14 as the basis for discounting claimant's credibility. Thus, any
15 attempt to utilize these inconsistencies as the basis for a negative
16 determination regarding plaintiff's credibility is error.

17 Finally, the ALJ held that plaintiff's "reported limited daily
18 activities are outweighed by the other factors" discussed in his
19 decision. Specifically, the ALJ discredited plaintiff's assertions
20 that she has no activities based on his opinion that her allegedly
21 limited daily activities cannot be objectively verified with any
22 reasonable degree of certainty. The ALJ went on to state that even if
23 her daily activities are truly as limited as she alleged, "it is
24 difficult to attribute that degree of limitation to the claimant's
25 medical condition, as opposed to other reasons, in view of the
26 relatively weak medical evidence and other factors discussed in this
27 decision." (AR at 25). In evaluating claimant's credibility, the ALJ
28 must consider testimony by the claimant that appears to be less than

1 candid. See Smolen, 80 F.3d at 1284. The ALJ is in the best position
2 to make such a determination and there is no indication in the record
3 that the ALJ acted beyond his discretion in finding claimant's
4 testimony regarding her daily activities not to be candid and reflect
5 negatively on her credibility.

6 In sum, although the ALJ erred in citing the inconsistencies
7 discussed above as a valid basis for a negative finding regarding
8 claimant's credibility, in light of the other bases for such a
9 finding, the Court finds the ALJ's error to be harmless. Thus, it
10 cannot serve as grounds for remand. Burch v. Barnhart, 400 F.3d 676,
11 679 (9th Cir. 2005).

12 **G. Remand is Required to Remedy Defects in the ALJ's Decision**

13 The choice of whether to reverse and remand for further
14 administrative proceedings, or to reverse and simply award benefits,
15 is within the discretion of the Court. McAlister v. Sullivan, 888
16 F.2d 599, 603 (9th Cir. 1989). Remand is appropriate where additional
17 proceedings would remedy defects in the ALJ's decision, and where the
18 record should be developed more fully. Marcia v. Sullivan, 900 F.2d
19 172, 176 (9th Cir. 1990).

20 Here, the Court finds remand appropriate. The ALJ failed to
21 establish the credibility of the vocational expert and relied on his
22 testimony in error. On remand, the ALJ must inquire whether the
23 vocational expert's testimony conflicts with the DOT, and if it does,
24 ensure the record contains persuasive evidence to support the
25 vocational expert's credibility and such a deviation from the DOT.

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ORDER

The Court, therefore, VACATES the decision of the Commissioner of Social Security Administration and REMANDS this action for further administrative proceedings consistent with this Memorandum Opinion and Order.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: July 17, 2006

/s/
JENNIFER T. LUM
UNITED STATES MAGISTRATE JUDGE